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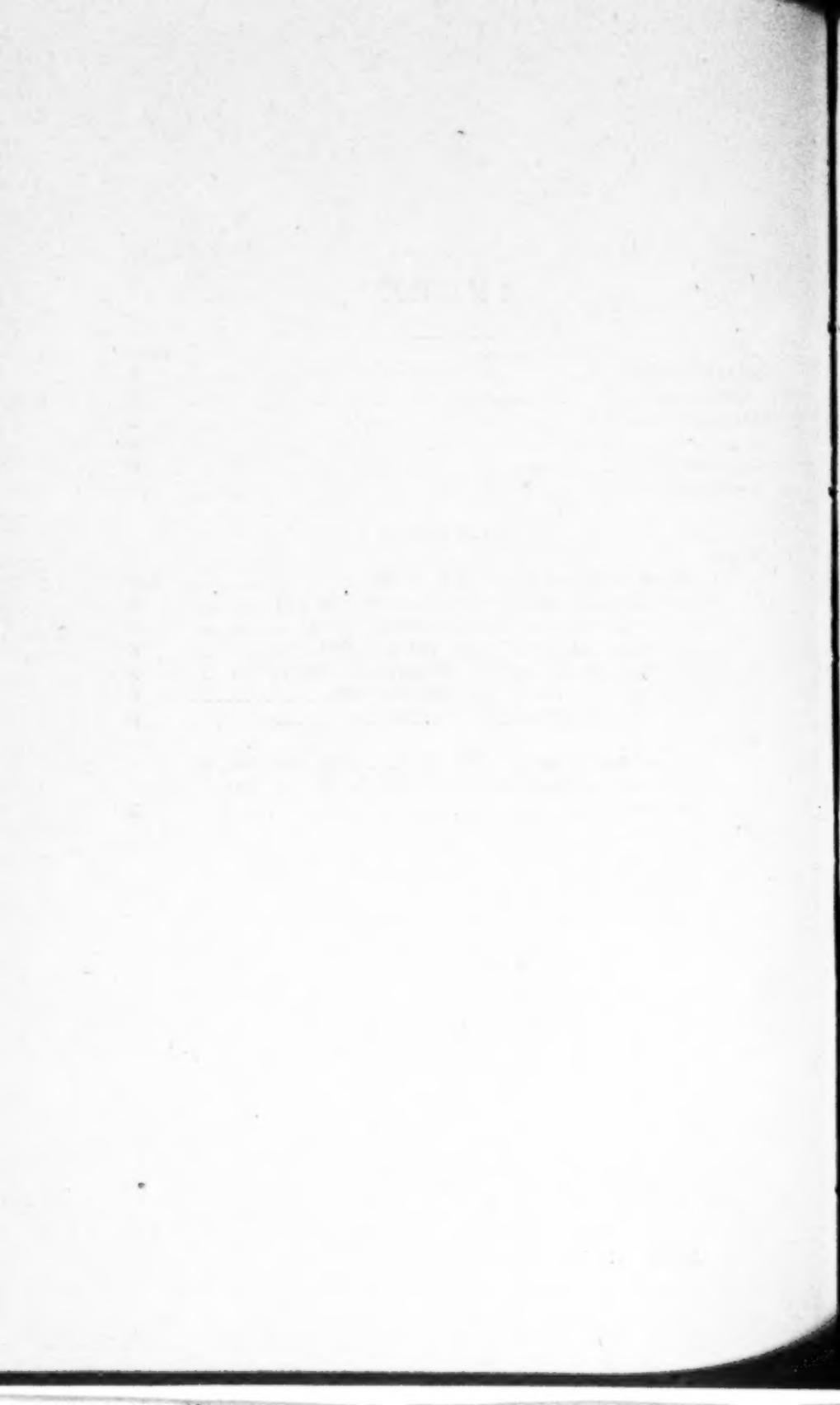
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(1)



In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 232

ANREW KJAR, ALIAS PETER ORLOFF, PETITIONER
v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinion of the court below (R. 28-32) is reported in 69 F. Supp. 406. The opinion on motion for a new trial (R. 33-36) is not yet reported.

JURISDICTION

The judgment of the court below in favor of the United States on its counterclaim, in the amount of \$100,685.11, plus interest, was entered February 3, 1947. (R. 28.) On March 3, 1947,

the plaintiff below¹ filed a motion for a new trial. On May 5, 1947, the motion was allowed in part and overruled in part and judgment was entered for plaintiff, Katherine D. Kjar, in the amount of \$6,000, and judgment was entered for the Government on its counterclaim against Andrew Kjar in the amount of \$106,685.11, plus interest. (R. 36-37.) This petition for a writ of certiorari was filed July 30, 1947. The jurisdiction of this Court is invoked under section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Where the Board of Tax Appeals (now the Tax Court), for the purpose of determining the income tax liability of petitioner, made a finding of fact as to the quantity of distilled spirits illegally imported into the United States by him during the period involved, is such finding binding upon the Court of Claims in a subsequent proceeding involving distilled spirits taxes upon the importations?

STATEMENT

The special findings of fact of the Court of Claims (R. 14-28) may be summarized as follows:

During the period involved, the petitioner was

¹ The suit below was instituted by Andrew Kjar, petitioner herein, Katherine D. Kjar, nee Orloff, and Ester Harley Sharon, severally and jointly.

engaged in the illicit importation and sale of distilled spirits (R. 14-15) and failed to file returns for either income or distilled spirits tax purposes. The Commissioner of Internal Revenue made jeopardy assessments against petitioner for income tax deficiencies and penalties for the years 1928 to 1932, inclusive, and upon his failure to satisfy such assessments, his properties were seized and sold by the Collector of Internal Revenue pursuant to the relevant provisions of the Revised Statutes. (R. 15, 18-26.)

The Commissioner of Internal Revenue also assessed distilled spirits taxes against petitioner and other individuals associated with him in his illegal operations, and those assessments were outstanding and unsatisfied at the time the instant suit was filed in the Court of Claims. (R. 16-17.)

Petitioner appealed to the Board of Tax Appeals (now the Tax Court, and hereinafter sometimes referred to as the Board) from the Commissioner's determination of his income tax liability, and the Board determined that the taxes of Kjar and his wife, Katherine D. Kjar, had been overpaid for the period involved, in the total amount of \$16,025.59.² *Kjar v. Commissioner*, 1941 P-H B. T. A. Memorandum Decisions, par. 41,446. Incidental to this determination, the

² Petitioner actually paid no taxes and the overpayment found by the Board resulted from the application to the assessments of the proceeds of the sales of his property.

Board found that during the year 1928 petitioner had imported 2,566 cases of distilled spirits, and that during the year 1930, he had imported 750 cases (aggregating 9,948 gallons), and that for the years 1929, 1931 and 1932 he had not engaged in the liquor business. (R. 17.)

Checks aggregating the amount found by the Board to be owing by the Commissioner were issued by the disbursing officer in favor of Andrew Kjar and his wife, Katherine D. Kjar, and were transmitted to the Collector of Internal Revenue for appropriate action. In view of the fact that the Collector had outstanding on his records against petitioner large amounts of distilled spirits taxes, a deputy collector presented the checks to petitioner and his wife with the request that they be suitably endorsed in order that the amounts thereof might be applied in partial satisfaction of the distilled spirits taxes. Petitioner and his wife refused to so endorse the checks and the deputy collector then requested Katherine D. Kjar to show what portion of the refund was due to her personally, but since she was unable to do so, the checks were returned to the Commissioner of Internal Revenue at Washington, D. C. (R. 17-18.)

Petitioner brought this suit in the Court of Claims to recover the properties seized and sold by the Collector, or the monetary equivalent thereof, together with the amount of overpayment of

income taxes found by the Board of Tax Appeals, and certain alleged damages. (R. 2, 3.) Respondent answered petitioner's petition in the Court of Claims by a special answer and counterclaim praying the dismissal of the petition and a judgment over in favor of respondent in amount of \$100,685.11, which represented the outstanding distilled spirits tax assessments as reduced by the overpayment of income taxes found by the Board in favor of petitioner and his wife. (R. 4-5.)

The evidence adduced at the trial established that petitioner had sold the distilled spirits which he smuggled into the United States for beverage purposes and that no distilled spirits taxes or customs duties had been paid on such distilled spirits. (R. 14-15.) Therefore, the respondent amended its special answer and counterclaim praying judgment against the petitioner in amount of \$1,217,854.01, which represented the beverage rate on the quantity of distilled spirits determined by the Commissioner of Internal Revenue to have been imported, together with the customs duties thereon.³ (R. 7-9.)

³ In his assessments of distilled spirits taxes, the Commissioner of Internal Revenue applied the basic or production rate of \$1.10 per gallon prescribed by subdivision (3) of Section 600 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, as amended by Section 900 of the Revenue Act of 1926, c. 27, 44 Stat. 9, whereas respondent's counterclaim sought judgment against petitioner at the rate of \$6.40 per gallon as prescribed by subdivision (4) of Section 600, as amended, for distilled spirits diverted to beverage purposes.

The Commissioner of Internal Revenue in making his distilled spirits tax assessments against petitioner and other individuals associated with him in his smuggling operations determined that from June 1928 to January 1932 petitioner had illegally imported and diverted to beverage purposes 108,463 gallons of distilled spirits.* The amount of distilled spirits taxes originally assessed by the Commissioner of Internal Revenue was \$119,309.30, but as one of the assessments was later reduced by the amount of \$2,598.60 by the acceptance of an offer in compromise made by one of the taxpayers, the amount of taxes outstanding at the time this suit was instituted was \$116,710.70. (R. 16.)

ARGUMENT

The Court of Claims determined from the evidence that the petitioner had completely failed to prove the amount of the distilled spirits which he illegally imported into the United States during the years involved, and that, therefore, the presumptive correctness of the determination of the Commissioner of Internal Revenue had not been rebutted. (R. 30.) The only issue which the petitioner seeks to have reviewed in this Court is whether the Court of Claims was estopped by the decision of the Board of Tax Appeals to determine that a greater quantity of distilled spirits

* The record at page 16, showing that the assessment of April 1939 was made on 27,318 gallons, is incorrect. The correct gallonage is 37,318. (R. 5, 8.)

had been imported by petitioner than that found by the Board.

The petitioner starts from the faulty premise that the identical distilled spirits tax assessments involved in the instant proceeding were at issue before the Board of Tax Appeals. (Pet. 15.) But the sole question before the Board was the correct income tax liability of petitioner for the years involved. In this determination, the Board was concerned merely with the selling price of the whiskey acquired by petitioner and the cost of such whiskey to him. Neither the source of the acquisition nor the disposition of the liquor was pertinent to the inquiry. It was immaterial whether the distilled spirits had been illegally imported or whether they had been diverted to beverage purposes. In the instant suit, however, for the purpose of determining the correct amount of judgment on respondent's counterclaim, it was necessary for the Court of Claims to inquire into the question of whether the distilled spirits had been illegally imported into the United States and whether such spirits had been diverted to beverage purposes. Since the finding by the Board of Tax Appeals, that the distilled spirits involved were illegally imported into the United States by the petitioner, was not essential to its determination, the Court of Claims was not estopped by the finding of the Board to determine the correct quantity of distilled spirits smuggled into the United States.

The applicability of the doctrine of estoppel by judgment is well settled. In a different cause of action between the same parties, the doctrine applies only as to those matters which were distinctly in issue as a ground of recovery in the former proceeding. *Tait v. Western Md. Ry. Co.*, 289 U. S. 620, 623; *United States v. Moser*, 266 U. S. 236, 241; *Cromwell v. County of Sac*, 94 U. S. 351, 352-353. The rule is succinctly stated in *Southern Pacific R. R. Co. v. United States*, 168 U. S. 1, 48:

The general principle announced in numerous cases that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.

See also *New Orleans v. Citizens' Bank*, 167 U. S. 371, 396; *Myers v. International Trust Co.*, 263 U. S. 64.

The petitioner apparently is endeavoring to apply the doctrine of *res judicata*, under which every admissible matter offered to sustain or defeat the prior claim or demand is barred from litigation between the parties or their privies upon any ground whatsoever. But that doctrine

has no application here, *Cromwell v. County of Sac, supra*, since the issue in this proceeding has not been adjudicated before, by the Board or any other tribunal. The petitioner seems to have overlooked the difference in character between the income tax assessments involved in the proceeding before the Board of Tax Appeals and those involved in the instant suit. The income tax assessments before the Board were made only against petitioner and his wife, and their income tax liability was the sole issue. But a different situation exists as to the distilled spirits tax assessments. The petitioner, in his illicit operations, was associated with certain other persons, each of whom owned a portion of the distilled spirits smuggled into the United States. In the income tax case, petitioner obviously was liable for taxes only on the profits which accrued to him on his portion of the shipments. However, this was not true as to the distilled spirits taxes. Those assessments covered the aggregate quantity of distilled spirits illegally imported into the United States by the entire group and the assessments were made against all parties involved jointly and severally. Therefore, the total amount of such assessments could be collected from one or more of the taxpayers against whom the assessments were made. It is apparent, therefore, that the Court of Claims, which had for consideration only the validity of the distilled spirits tax assessments, was at liberty to disregard the finding by the Board of Tax Ap-

peals in the income tax case and determine that petitioner was liable for distilled spirits taxes on a larger quantity than that found by the Board of Tax Appeals.

When the instant suit was filed, the distilled spirits tax assessments were outstanding against the petitioner and he failed to prove that such assessments were incorrect or otherwise invalid. Therefore, the Court of Claims had no alternative but to render judgment thereon.

CONCLUSION

The petition for certiorari presents no question warranting review and should be denied.*

Respectfully submitted.

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SEPTEMBER 1947.

* The court below rendered judgment on respondent's counterclaim at the basic or production rate of \$1.10 per gallon on the gallonage of distilled spirits determined by the Commissioner of Internal Revenue to have been imported. The respondent contended that in view of the evidence, the beverage rate of \$6.40 should have been used and that in addition, judgment should have been entered against the petitioner for the customs duties imposed upon imported distilled spirits of \$5 per gallon. In the event the petition for a writ of certiorari is granted, the respondent expects to renew those contentions in this Court, for purposes of sustaining the judgment below.